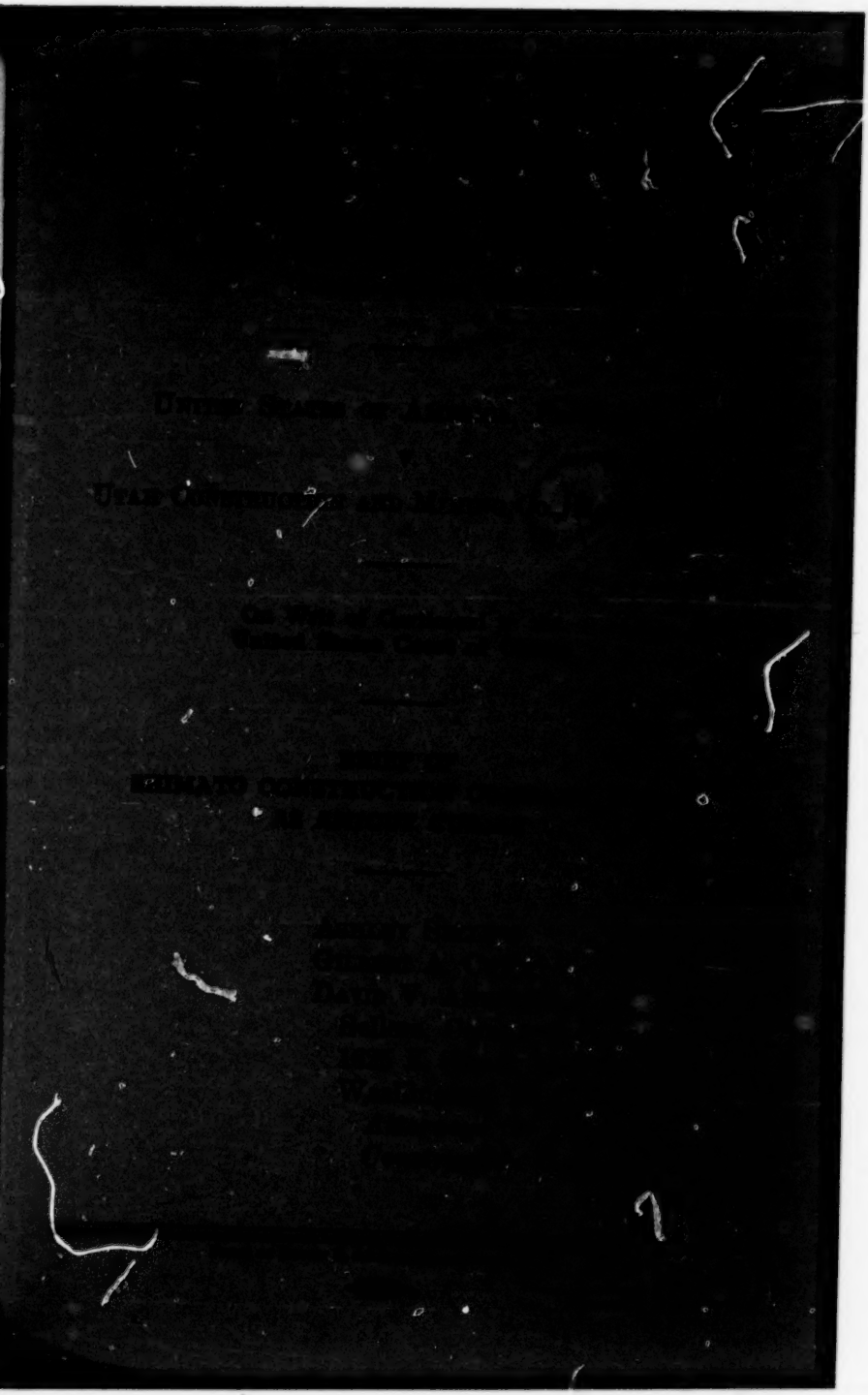

INDEX

	Page
QUESTIONS PRESENTED	1
INTEREST OF AMICUS CURIAE	2
ARGUMENT	3
Introduction and Summary	3
PRELIMINARY POINTS	5
1. The Issue Is Contract Interpretation	6
2. Proceedings Before a Contract Appeals Board Are Arbitral Not Administrative	12
3. Petitioner Misapprehends the Issue and Holding in *United States* v. *Carlo Bianchi*, 373 U.S. 709 (1963)	15
I. REFUTATION OF PETITIONER'S ARGUMENT ON THE FIRST ISSUE	18
II. REFUTATION OF PETITIONER'S ARGUMENT ON THE SECOND ISSUE	28
(a) Court of Claims Cases	36
(b) Administrative Practice	36
CONCLUSION	38
APPENDIX	1a
Address by J. E. Welch, Deputy General Counsel, General Accounting Office, before Government Contracts Committee, D. C. Bar Association, January 13, 1966, on Unliquidated Damage Claims for Breach of Contract.	

CITATIONS

CASES:

Allied Paint & Color Works v. *United States*, 309 F. 2d 133 (2d Cir. 1962)	27
Climatic Rainwear Co. v. *United States*, 115 Ct. Cl. 520, 88 F. Supp. 415 (1950)	7
Cooke v. *United States*, 91 U.S. 389 (1875)	13

Page

Cramp & Sons v. *United States*, 216 U.S. 494 (1915) .. 6
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 15
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1961), *reh. den.*, 377 U.S. 934 (1963) 23
Kihlberg v. *United States*, 97 U.S. (7 Otto) 398 12
McWilliams Dredging Co. v. *United States*, 118 Ct. Cl. 1 (1950) 8
Morrison-Knudsen v. *United States*, 345 F. 2d 833 (Ct. Cl. 1965) 27, 29, 34, 38
Perry v. *United States*, 294 U.S. 330 (1935) 13
Phoenix Bridge Co. v. *United States*, 85 Ct. Cl. 603 (1937) 24, 36
Potashnick v. *United States*, 123 Ct. Cl. 97 (1952) 32
Silverman Bros., Inc. v. *United States*, 324 F. 2d 287 (1st Cir. 63) 27
United States v. *Adams*, 74 U.S. (7 Wall.) 463 (1868) .. 7
United States v. *Anthony Grace & Sons*, No. 439, October Term 1965 (Petitioner's Brief) 22
United States v. *Carlo Bianchi*, 373 U.S. 709 (1963) 5, 15, 16, 17, 19, 20, 28, 35
United States v. *Hamden Co-op Creamery Co.*, 297 F. 2d 130 (2d Cir. 1961) 27
United States v. *Moorman*, 338 U.S. 457 (1950) 9, 11
United States v. *Morgan*, 313 U.S. 409 (1941) 15
United States v. *Peter Kiewit Sons Co.*, 345 F. 2d 879 (8th Cir. 1965) 26
United States v. *Wunderlich*, 342 U.S. 98 (1951) 9, 10, 11, 35
Utah Constr. & Mining Co. v. *United States*, 339 F. 2d 606 (Ct. Cl. 1964) 2, 3, 17, 21

MISCELLANEOUS:

Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1001 (1964) 13
30A AM. JUR., *Judgments*, §§ 328, 329 (1958) 28
Atomic Energy Commission Board of Contract Appeals, *Regulations*, 10 C.F.R., Part 3 (1965) 14
CCH GOVERNMENT CONTRACTS REPORTER, *Authority and Jurisdiction of Boards* and *Necessity for Contract and Disputes Clauses*, ¶¶ 23,055, 23,060 8

Page

2 CCH GOVERNMENT CONTRACTS REPORTER, *Board of Contract Appeals*, ¶¶ 24,080, 24,085, 23,100, 23,120, 23,130 ..... 23, 24, 35
Clark, *Government-Caused Delays in the Performance of Federal Contracts: The Impact of the Contract Clauses*, 22 MIL. L. REV. 1 (1963) 36
6 Corbin, *Contracts*, §§ 1253, 1254 (1962) 33
Crowell & Anthony, *Practical Problems Facing Contractors Counsel as a Result of Fragmentation of Remedies*, 18 ADMIN. L. REV. 128 (1965) 22
Ellison, Address at the Court of Claims Centennial Banquet reported at 132 Ct. Cl. 1 (1955) 6, 22
Jaffe, *Judicial Control of Administrative Action* (1965) 13
Landis, *The Administrative Process* (1938) 13
Packers and Stockyards Act, 1921, As amended (7 U.S.C. § 181, et seq.) 15
Schultz, *Wunderlich Revisited, New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW AND CONTEMP. PROBS. 115 (1964) 11, 17
Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 GEO. WASH. L. REV. 481 (1959) 6
Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROBS. 39, 42-44 (1964) 8, 12
Speck, *Delays-Damages on Government Contracts; Constructive Conditions and Administrative Remedies*, 26 GEO. WASH. L. REV. 505 (1958) 37
Tucker Act, 28 U.S.C. § 1491 5
Welch, *Unliquidated Damage Claims for Breach of Contract*, Address before Govt. Contracts Committee, D. C. Bar Association, January 13, 1966 ... 6, 37
Wunderlich Act, 41 U.S.C. §§ 321, 322 (1964) ... 4, 10, 11, 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 440

UNITED STATES OF AMERICA, *Petitioner,*

v.

UTAH CONSTRUCTION AND MINING CO., *Respondent.*

On Writ of Certiorari to the United States Court of Claims

BRIEF OF SHIMATO CONSTRUCTION COMPANY, LTD. AS *AMICUS CURIAE*

Shimato Construction Company, Ltd. files this brief as *amicus curiae* pursuant to the written consent of the parties submitted herewith.

QUESTIONS PRESENTED

1. Is a factual finding made by a contract appeals board (or other designee of a department or agency head) in an arbitration proceeding under the "Dis-

putes" clause, contained in many Government contracts, binding on the contractor in a Tucker Act suit for breach of contract, reformation, rescission or injunction?

2. Does the "Disputes" clause require that all disputed questions of fact be decided by arbitration even though the relief sought, such as reformation, rescission, injunction, or damages for breach of contract, is not available from such arbitration board and is solely within the jurisdiction of the courts?

INTEREST OF *AMICUS CURIAE*

The issues which are to be reviewed in this case are identical to those involved in No. 224-62 in the Court of Claims in which Shimato Construction Company, Ltd., is plaintiff.

In No. 224-62 there is presently pending for decision by the Court of Claims the Government's request to review the Commissioner's Order dated December 20, 1965, allowing Shimato's request for a trial on its claim and the Government's four counterclaims. Following the decision of the court below in *Utah Constr. & Mining Co.* v. *United States,* 339 F.2d 606 (Ct. Cl. 1964), the Commissioner determined that Shimato's claim was for breach of contract and that Shimato accordingly is entitled to a trial notwithstanding that some of the facts pertinent to Shimato's claim had been found by the contract appeals board. Action by the Court of Claims on the Government's request for review has been stayed pending a decision by this Court in the instant case.

ARGUMENT

Introduction and Summary

This brief contains a very limited discussion of the facts of the *Utah* case. It believes that the controlling legal principle dispositive of both the *Utah* and *Shimato* cases is a pure question of law involving contract interpretation and the specific facts of cases are not relevant to its resolution. The *Utah* and *Shimato* facts are only illustrations of the context of the principle which is involved in *every* contract case brought under the Tucker Act in which there is a factual issue.

Shimato asserts that what is involved is simply a question of interpretation involving the arbitration (Disputes) clause of the contract. Since the decision of the court below accurately reflects forty years of the contemporaneous interpretation of the clause by the parties, it is believed that such contemporaneous interpretation is the best evidence of the parties' intent and should be accepted by the Court. Petitioner's position seeks to reject the longstanding and contemporaneous interpretation of the parties.

As discussed by the court below, since the advent of the "Disputes" clause, two distinct types of disputes arising from the performance of Government contracts have been recognized. One type of dispute involves the Government's breach of the contract, or other facts giving a contractor a right to reformation, rescission or injunction. Such disputes are resolved by suits brought by the contractor under the Tucker Act in the Court of Claims (28 U.S.C. § 1491 (1964)) or the federal district courts (28 U.S.C. § 1346 (1964)). Historically, the courts have held *nisi prius* trials to

resolve any fact issues. Traditionally, the department and agency heads and consequently their designated contract appeals boards (hereafter sometimes referred to as the board) have stated that they do not have authority under the "Disputes" clause to render relief of the type just indicated.

The second type of dispute is a one involving some specific contract provision, such as the "Changes" or "Changed Conditions" clauses, which gives the Government the right to grant relief to the contractor by the issuance of an equitable adjustment of the contract price and/or an extension of time for performance. In this second type of dispute all controverted issues of fact must be presented to the agency head or his representative whose decisions are final subject to judicial review under the standards of the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1964).

It is inevitable that some of the facts in one type of dispute also will be involved in the other type of dispute. The basic question then becomes, "Who resolves such 'common facts'?" Petitioner would solve the "common facts" problem by having the agency determine them and make such determination binding on the courts in a suit based upon breach of contract, or seeking reformation, rescission, or injunction. Petitioner would go further and eliminate the distinction between the two types of disputes, and have the agency finally determine *all* facts in controversy.

To illustrate, in a suit for reformation, the contractor would first go to the agency to have all pertinent facts determined. The agency would give no relief. The contractor would then take the agency findings to court and ask the court for reformation. If such

procedure were adopted, the trial jurisdiction of the Court of Claims and the district courts under the Tucker Act for claims "founded upon . . . contract" (28 U.S.C. § 1491) would be completely eliminated.

Shimato asserts that the distinction between the two types of disputes represents the contemporaneous interpretation of the contract by the parties and should be upheld; further, that the distinction is necessary from a practical viewpoint, and that petitioner's position is unworkable.

Before discussing petitioner's specific arguments, Shimato discusses three points which are necessary to a proper understanding of the issues and of Shimato's argument.

PRELIMINARY POINTS

Petitioner's position on the two issues before the Court is flawed and rendered invalid by three fundamental errors in concept and approach, *viz:* (1) Petitioner fails to recognize that the issue is one of *contract interpretation, i.e.*, interpretation of the "Disputes" article of the contract; (2) Petitioner fails to recognize that the proceedings before the contract appeals boards are *arbitration* proceedings under a contract arbitration clause, not "administrative proceedings;" and (3) Petitioner misapprehends the issues and the decision of the Court in *United States* v. *Carlo Bianchi,* 373 U.S. 709 (1963).

While these points may appear elementary, it is submitted that petitioner's failures in these three areas are fatal to the position which it has taken in this Court. Each of these points are considered separately before the specific arguments made by the petitioner in its brief are considered.

1. THE ISSUE IS CONTRACT INTERPRETATION.

Fundamental to proper analysis of the issues is recognition that what is involved here is merely a question of contract interpretation. Petitioner seemingly recognizes this fact in framing the issues but in the course of its argument becomes completely distracted by extraneous considerations.

Claims "founded upon any express or implied contract" are enforceable against the United States solely by virtue of the waiver of sovereign immunity contained in the Tucker Act. This act, as amended, vests the United States Court of Claims with exclusive authority to determine such claims except those under $10,000, where the United States district courts are given concurrent jurisdiction. Decisions by the Court of Claims and the district courts are final and binding on both parties, subject to appropriate review.[1]

No statute gives to any Government official or agency authority to finally decide claims "founded upon . . . contract." *Cramp & Sons* v. *United States*, 216 U.S. 494, 500 (1915).[2] The Comptroller General has authority to settle breach of contract claims and such settlements are binding on the Government. 31 U.S.C. §§ 71, 74 (1964). But he has no authority

---

[1] See Address by *Newell Ellison* at the Court of Claims Centennial Banquet reported at 132 Ct. Cl. 1 (1955).

[2] See Address by *Mr. J. E. Welch*, Deputy General Counsel, General Accounting Office, reproduced in the appendix hereto. For an argument that government officials *should have* such authority see Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 GEO. WASH. L. REV. 481 (1959).

to decide a breach of contract claim and have that decision binding on the claimant. *Climatic Rainwear Co.* v. *United States*, 115 Ct Cl 520, 88 F. Supp. 415 (1950).

Boards of contract appeals are established by order of the heads of governmental departments and agencies and authorized to render decisions on claims or disputes. Their authority is delegated from the head of the particular department or agency. For example, the Armed Services Board of Contract Appeals is established by the Secretaries of Defense, Army, Navy and Air Force to act as their representative. The administrative authority delegated to such boards by the secretaries varies among the departments and agencies. However, no head of a department or agency possesses *administrative* authority to decide finally any claim against a claimant and he cannot empower boards to do so. *United States* v. *Adams*, 74 U.S. (7 Wall.) 463 (1868).

On the other hand, heads of departments or agencies do possess *contractual* authority under the standard "Disputes" clause contained in many Government contracts to decide as "final and conclusive upon the parties . . . all disputes concerning questions of fact arising under this contract." The department or agency heads frequently delegate such *contractual* authority to a board of contract appeals.

The foregoing illustrates that contract appeals boards have two sources of authority to decide disputes, both delegated from the heads of the departments. One is administrative and is not binding on the contractor, and the other is contractual and is

binding on the contractor. This distinction is well established.[3]

The administrative, nonbinding, type of authority is described in the following oft-quoted statement by the Court of Claims in *McWilliams Dredging Company* v. *United States,* 118 Ct. Cl. 1, 16-17 (1950):

> It is evident that the Secretary was authorizing the Board to act for him in the way that any owner would act if a contractor was dissatisfied with the way he was treated by the owner's representative in charge. He would listen to the contractor's story, and if he thought that his representative had been unfair, he would reverse him. He would do this, not because the contract gave him any authority to make a final decision which would bar the contractor from relief in the courts for breach of contract, but because it would be the natural and fair way for an owner to act. And just as the contractor in the supposed case would sue for breach of contract if his appeal to the owner did not give him satisfactory relief, so can the contractor with the Government, if he has not contracted away his right to do so.

The boards thus wear two hats, an administrative hat and a contractual hat. The critical distinction between the boards' two types of authority has not been

---

[3] On the distinction between the two types of authority see Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals,* 29 LAW & CONTEMP. PROBS. 39, 42-44 (1964). Mr. Shedd is a vice-chairman of the Armed Services Board of Contract Appeals. An excellent summary and annotation is contained in 2 CCH GOVERNMENT CONTRACTS REPORTER, ¶¶ 23,055, 23,060 titled "Authority and Jurisdiction of Boards" and "Necessity for Contract and Disputes Clauses," respectively.

made by petitioner and its brief lumps the two together. The important point to be noted here is that the department or agency head theoretically could delegate to his board every administrative power in his possession and the board would not possess any authority to finally decide any claim "founded upon contract." Therefore, regulations or orders issued by the head of the department or agency enlarging or decreasing the board's administratively derived jurisdiction cannot affect the rights of a contractor. His rights are defined by, and only by, the "Disputes" clause of the contract. The scope of such clause is, therefore, determined by looking at the plain language of the clause and by applying accepted rules of contract interpretation to determine the intent of the parties, *i.e.*, the Atomic Energy Commission and Utah Construction and Mining Company.

It must be specifically noted that the Wunderlich Act (41 U.S.C. §§ 321, 322 (1964.)) does not give the boards any statutory authority. Petitioner misconstrues entirely that act by arguing that it somehow gives the boards *statutory* authority to render final decisions. Completely to the contrary, the Wunderlich Act is a *statutory limitation* on the *contractual* authority of the contract appeal boards to make final decisions as derived from the "Disputes" clause.

The Wunderlich Act was the outgrowth of two decisions by this Court, *United States* v. *Moorman,* 338 U.S. 457 (1950) and *United States* v. *Wunderlich,* 342 U.S. 98, 100 (1951). In *Moorman,* this Court reversed the holding of the Court of Claims that contract clauses providing for arbitral resolution by the Government of legal questions was void as against public

policy because it ousted the courts of jurisdiction. In *Wunderlich,* this Court, again reversing the Court of Claims, held that judicial review of decisions by contract appeals boards under the "Disputes" clause was limited solely to a determination of whether the decision was the result of fraud. The Court rejected the more lenient prevailing review standards applied by the Court of Claims, *i.e.,* whether the decision was arbitrary or capricious, the result of bad faith, or unsupported by substantial evidence.

Congress, dissatisfied with the great authority which these interpretations of the "Disputes" clause gave to the contract appeals boards, passed the Wunderlich Act in 1954. It provides:

> Section 321. Limitations on pleading contract-provisions relating to finality; standards of review.
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

Section 322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, § 2, 68 Stat. 81.

Section 1 of the Act *limits* the finality of a decision under the "Disputes" clause to determinations which were not only not fraudulent but also to those that were not arbitrary *or* capricious *or* so grossly erroneous as necessarily to imply bad faith *or* not supported by substantial evidence.

Section 2 of the Act prohibits the inclusion in a contract of any provision giving finality to board determinations of questions of law. Thus, the Wunderlich Act is a *statutory limitation* on the *contractually* derived authority of the contract appeals boards. The act does not give the *boards* any statutory authority to do anything. The Act gives the *courts* broader authority to review board decisions than they had previously possessed. The proviso of the Act, although couched in affirmative language, gave the board no authority it did not already have as a result of the "Disputes" clause. It was entitled an Act "To Permit Review of Decisions of Heads of Departments * * *." Its purpose was to limit finality of decisions granted by the "Disputes" clause as interpreted in *Moorman* and *Wunderlich*. *United States* v. *Carlo Bianchi*, 373 U.S. 709 (1963) at pp. 713-716. See also Schultz, *Wunderlich Revisited, New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 Law and Contemp. Probs. 115, 116-120 (1964).

2. PROCEEDINGS BEFORE A CONTRACT APPEALS BOARD ARE ARBITRAL NOT ADMINISTRATIVE.

The second misconception of petitioner also is fundamental. Underlying petitioner's position is its assumption that proceedings before a contract appeals board are "administrative proceedings," whereas, in fact, such proceedings are arbitration proceedings. The "Disputes" clause is nothing more or less than an arbitration clause whereby the parties agree that certain types of disputes will be arbitrated by the head of the Government department or agency.

The legality of such arbitral agreements was upheld as early as 1878, *e.g.*, *Kihlberg* v. *United States*, 97 U.S. (7 Otto) 398. In commenting on this case, Vice Chairman Shedd noted:

> Kihlberg was nothing more than the application to a government contract that was then, and still is, a well-established principle of the law of private contracts, namely, that the parties to a contract can agree to be bound by the decision of a designated person with respect to a matter arising under the contract. . . . The approach of the courts is that it is simply a matter of giving effect to the intention of the parties as expressed in the contract.[4]

Since the "Disputes" clause is merely an arbitration agreement such as is used in private commercial contracts, petitioner's references to the "administrative process" are misplaced and misleading, thus casting in the same mold the functioning of the contract appeals boards and that of such agencies as the Interstate Commerce Commission, the Federal Trade Commis-

---

[4] See Shedd, *supra* note 3, at 43-44.

sion, etc. The "administrative process" has been defined thus:

> [It is not] simply an extension of executive power. Confused observers have sought to liken this development to a pervasive use of executive power. . . . In the grant to it of that full ambit of authority necessary for it to plan, to promote and to police, it presents an assemblage of rights normally exercisable by government as a whole.[5]

The foregoing definition indicates the very broad scope of the administrative process. It embraces delegated authority of the rights normally exercisable by Government as a whole "to plan, to promote and to police." Patently, the scope of the "Disputes" clause does not relate to the Governmental function "to plan, to promote, and to police." Nor does it include "an assemblage of rights normally exercisable by government as a whole." The "administrative process" basically is a development of political theory and is to be considered in the context of the proper role of Government in light of extant economic and social conditions.

In distinct contrast to the administrative process is the nature of arbitration. While the administrative process is wholly governmental in character, arbitration is wholly contractual and is non-governmental.[6]

---

[5] Landis, *The Administrative Process,* at p. 15 (1938). This definition is adopted by Dean Louis L. Jaffe in *Judicial Control of Administrative Action,* p. 3 (1965).

[6] The exemption of the Government's procurement efforts from the requirements of the Administrative Procedure Act recognizes this distinction. (60 Stat. 243 (1946), 5 U.S.C. § 1001 (1964)). The distinction between the activities of the Government acting in a procurement or proprietary capacity and its activities in a Governmental or sovereign capacity has long been recognized. *Cooke* v. *United States,* 91 U.S. 389, 398 (1875); *Perry* v. *United States,* 294 U.S. 330, 352 (1935).

While the administrative process takes in the whole of political, economic-socio development, arbitration is narrowly concerned with nothing more than what is contained in a particular clause. Nor is arbitration governmental in origin. It is a commercial practice adopted into government contracts. The fact that employees of the Government are arbitrators does not change the nature of the proceedings. The Government employed arbitrators are acting in a contractual capacity and not in a Governmental or sovereign capacity. The authority they exercise comes from the contract while the source of administrative authority proximately and ultimately is always the Constitution.

The fact that Government employees usually are the arbitrators has caused their actions frequently to be imprecisely called "administrative proceedings." The term "exhaustion of administrative remedies" has frequently been used, improperly and loosely. More precise terminology would describe such remedies (under the "Disputes" clause) as "contractual remedies." In its proper sense an "administrative remedy" is that provided by law or regulation. The remedies here involved are provided by neither but, rather, by the contract itself.

Illustrating the arbitral nature of the contract appeals boards proceedings is the recent practice of the Atomic Energy Commission to use a panel of three arbitrators, two of whom are not Government employees. The two non-Government members can determine the result by majority vote.[7] Such procedure

[7] The regulations governing the Atomic Energy Commission Board of Contract Appeals are set forth at 10 C.F.R., Part 3 (1965). See §§ 3.3 (b) and (c); 3.20.

highlights the impropriety of in any way equating or associating the proceedings under the "Disputes" clause with administrative law in its true Governmental sense.

It is seen therefore, that the respective roles of the Court of Claims and the contract appeals board involved in the instant case are not "collaborative instrumentalities of justice" in the sense that this Court has characterized the inter-relationship of courts and such administrative agencies as the Federal Communications Commission, the Interstate Commerce Commission and the Secretary of Agriculture discharging his decisional responsibilities under the Packers and Stockyards Act, 1921, as amended, (7 U.S.C. § 181 *et seq.*). *U.S.* v. *Morgan,* 313 U.S. 409, 422 (1941); *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940). As heretofore noted, the Court of Claims has jurisdiction, by statute, over one type of dispute and the contract appeals boards, only by agreement of the contracting parties, over other types. In both instances, the subject matter of the disputes arises out of the exercise of the proprietary as distinguished from the regulatory functioning of the Government.

3. Petitioner Misapprehends the Issue and Holding in United States v. Carlo Bianchi, 373 U.S. 709 (1963).

Petitioner relies primarily on the authority of the Court's decision in the *Bianchi* case which is cited at twelve different places in its brief. Each of its arguments rests on the authority of that case. It is submitted that throughout its arguments petitioner misapprehends the issue and the holding in the *Bianchi* case.

As presented to the Court, the *Bianchi* case was straightforward with clean-cut issues. The Corps of Engineers Contract and Appeals Board had denied the contractor's claim based on the "Changed Conditions" clause of the contract. In a subsequent action under the Tucker Act, the Court of Claims reversed the board's decision and entered judgment against the Government on the issue of liability. In arriving at its decision, the Court of Claims held a trial *de novo* admitting evidence that had not been presented at the board proceedings. This Court granted *certiorari,* to "resolve a conflict among the lower courts on the important question of the kind of judicial proceeding to be afforded in cases governed by the Wunderlich Act." The Court stated the issue:

> This case involves the interpretation and application of the "Wunderlich Act," 68 Stat. 81, 41 U.S.C. §§ 321-322, an Act designed to permit judicial review of decisions made by federal departments and agencies under standard "disputes" clauses in government contracts. *The issue before us is whether, in a suit governed by this statute, the Court is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on such issues.* [*Id.* at 709-10.] (Emphasis supplied.)

The Court again stated the issue:

> Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra,* p. 709, is whether the Court of Claims is limited to the administrative record

> with respect to that controversy or is free to take new evidence. [*Id* at 714.]

The Court succinctly stated its holding:

> It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. [*Ibid.*]

The foregoing clearly discloses that the *Bianchi* decision held only that, in a dispute over which the contract appeals board had *contractual* authority to render a final decision, if it met the Wunderlich Act standards, judicial review of the agency decision is to be limited to the board record and additional evidence is not permitted. The *Bianchi* decision had nothing whatever to do with the situation involved in the instant case, *viz.*, "What forum should determine the facts pertinent to a breach of contract claim or a suit for reformation, rescission or injunction over which the contract appeals board has no contractual jurisdiction." In *Bianchi* the Court carefully distinguished that case from the present one:

> Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract . . . ." [*Id.* at 714]

The care with which the Court in *Bianchi* defined the issue before it and specifically excluded the type of situation involved in the *Utah* and *Shimato* cases was noted by commentators long before these cases came to issue. See Schultz, *Wunderlich Revisited, New Limits*

on Judicial Review of Administrative Determination of Government Contract Disputes, 29 LAW AND CONTEMP. PROBS. 115, 120-123 (1964).

I. REFUTATION OF PETITIONER'S ARGUMENT ON THE FIRST ISSUE

Petitioner argues that a contractor who unsuccessfully presents a claim to a contract appeals board on a theory giving the board jurisdiction under one type of dispute (*i.e.*, under the "Disputes" clause) should not thereafter be permitted to change his theory to breach of contract for the purpose of obtaining a new trial before a court. We agree but assert that petitioner attempts to raise a false issue.

The two types of disputes are mutually exclusive and, accordingly, the problem posed by petitioner cannot and does not exist. Where a change in theory is advanced at the court level, the "problem" is resolved simply by proper analysis of the claim. If the claim (dispute) is of the type over which the contract appeals board had jurisdiction then by *definition* it cannot be a claim for breach of contract or reformation, rescission or injunction.

In such circumstances the contractor is bound by the board findings, subject to review under the Wunderlich Act standards. On the other hand, if the board did not have jurisdiction over the claim, even though the claim was presented to it, and the claim correctly analyzed is for breach of contract or reformation, rescission or injunction, the board's findings are a nullity and a trial should be held on all facts. There can be no valid switch of theories. Where such an attempt is made, one theory is right, one is wrong.

That proper analysis discloses the illusory nature of such "problem" is demonstrated by the instant case. Petitioner's brief at pages 19-21 alleges that respondent first brought to the board a claim based on changed conditions, and then *on the same set of facts* changed its theory to breach of contract. This is patently untrue. The opinion of the court below readily reveals that the changed conditions claim was based on the unexpected discovery of "float rock" and construction delays resulting therefrom. The breach of contract claim, on the other hand, was based upon the *delay of the contracting officer* in modifying the contract. These are two distinct and different delays, the latter type being a breach of contract under the authority cited by the court below.

1. Petitioner's main argument that "common facts" determined by a board must be binding on the Court of Claims in a breach of contract action is based on the contention that such result is required by the Court's decision in *United States* v. *Carlo Bianchi*. We have demonstrated under Point 3, *supra*, that the *Bianchi* decision related only to the type of judicial review to be afforded board determination of facts, where the dispute was properly before the board. The Court was careful to point out that "Respondent has not argued *in this Court* that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract . . . ." 373 U.S. at 714, (emphasis supplied). By the quoted language, the Court was pointing out that, although the contractor in *Bianchi* had switched to a breach of contract theory before the Court of Claims, he did not urge such breach of contract theory before this Court. Accordingly, the issue of common facts was not considered or decided in *Bianchi*.

Petitioner cites various passages from the *Bianchi* opinion as supporting its present position. Such language must be read in the context of the issue then under discussion and, so read, does not support petitioner's position.

The Court stated that:

> determination of the finality to be attached to a departmental decision on a question arising under a 'disputes' clause must rest solely on consideration of the record before the department . . . . [*Ibid.*]

Later, the Court stated that the purpose of the Wunderlich Act

> would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding. Moreover, the consequences of such a procedure would in many instances be a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense necessary to bring litigation to an end. [*Id.* at 717.]

Such language and holding is correct in the context of judicial review of a board decision when such decision involved a dispute properly before a board. But it has no application in the present case because the issue *is* whether a determination of a fact underlying a breach of contract or reformation claim was properly before the board and thus comes under the Wunderlich Act.

2. In this section of its brief petitioner argues further the same arguments made in the immediately preceding Section 1. Petitioner again pursues the false issue of the impropriety of first asserting a claim under the "Changed Conditions" clause and

then bringing a breach of contract suit on the same facts. As previously discussed, such are not the facts of the *Utah* case nor can such issue ever exist. Because, *if* the claim was properly before the contract appeals board under the "Changed Conditions" clause, by definition the identical claim cannot be one for breach of contract. The "Changed Conditions" clause makes an equitable adjustment under that clause the contractor's *exclusive* remedy for facts constituting a changed condition. The contractor has contracted away any previously existing right to sue on a breach theory on facts constituting a changed condition.

Similarly, under the "Changes" clause the contractor's only rights for a Government-ordered change to the work is an equitable adjustment provided by the "Changes" clause. The contractor has contracted away his previously existing right to sue for breach of contract on such facts. The contract appeals boards have contractual jurisdiction *only* through such clauses as the "Changed Conditions" and "Changes" clauses coupled with the "Disputes" clause. There are many other such clauses, a few of the more familiar are the "Suspension of Work" clause, the "Government-Furnished Property" clause and the "Negotiated Overhead Rate" clause.

Notwithstanding the foregoing, it does sometimes occur that a claim under a clause of the contract (for example, the "Changed Conditions" clause) will be based on *some* facts that are common to suit for breach of contract. The assertion of such claims are sometimes successive but frequently are concurrent. For example, a contractor may bring an action in the Court of Claims for breach of contract based upon Government-caused delays where the contract does not contain a "Suspension of Work" clause. At the same

time he may be processing before the agency's contract appeals board claims based on the "Negotiated Overhead Rate" clause. The two claims are distinctly different but arise from the same contract and probably will have some common facts.

Because the contract appeals procedure is more expeditious, there usually exists an appeals board determination of the "common facts" at the time the case comes up for trial before the court. The issue is whether the court is prevented from making its own determination of the common facts involved in the claim for breach of contract or for reformation. Or an action could be brought in the District Court for injunctive relief. Should the resolution of this "common fact" be only a footrace between the procedures of the court and the contract appeals board so that the first to issue a finding of fact binds the other?[8] Can

[8] This question is posed in the circumstance that the Court usually involved in Government contract litigation is the Court of Claims which was specifically established, equipped and manned for the trial and decision of such litigation. See *supra*, note 1. Examination of the docket entries in the Clerk's Office of the Court of Claims pertaining to the 34 contract cases argued on the merits in 1965, discloses that the parties requested or stipulated to 241 extensions of time. 180 of these or 75% were requested by the Government. The Government is in a position to intentionally or otherwise cause the arbitration proceedings to be completed prior to a court decision. In footnote 14 of its Brief in *United States* v. *Anthony Grace & Sons*, No. 439, October Term 1965, a companion case, petitioner states that disposition time in the Court of Claims for cases decided on the merits is 5½ years, citing Crowell & Anthony, *Practical Problems Facing Contractors Counsel as a Result of Fragmentation of Remedies*, 18 ADMIN. L. REV. 128, 139 (1965). The statistics given were post-*Bianchi* and were intended to demonstrate the slowdown in court procedures as a result of the confusion following the *Bianchi* decision. The article also indicates that in an average case a half year or more is taken by the Government to file its answer as a result of the failure of the interested agencies to forward litigation reports to the Department of Justice.

an appeals board by such prior determination reduce the jurisdiction of a court empowered by Article 3 of the Constitution?[9]

It is submitted that the answer to both questions should be in the negative. The jurisdiction of a constitutionally empowered court should not be reduced simply through the happenstance that in an arbitration proceeding such a common fact was decided. The question is one of contractual intent in agreeing to arbitration. Did the parties intend that determination of such common facts be binding on the courts? While arbitration clauses reducing the court's jurisdiction are not prohibited, the indignity of subjecting the courts to a footrace with appeals boards to retain its jurisdiction must be against public policy and may not be assumed to be the intent of the parties. The consistent contemporaneous interpretation of the parties from the inception has been that factual determinations by a contract appeals board are not binding in suits for breach of contract.

The Court of Claims and contract appeals boards have uniformly distinguished between claims based on breach of contract, reformation, and rescission, and those based upon a dispute arising under the contract. They have uniformly held that the "Disputes" clause did not contemplate claims of the former type and that such claims could be presented directly to the court. The cases hold that only claims "arising under the contract" were intended by the parties to be subject to the "Disputes" clause.[10]

---

[9] *Glidden Co.* v. *Zdanoc*, 370 U.S. 530 (1961), *reh. den.*, 377 U.S. 934 (1963).

[10] See 2 CCH GOVERNMENT CONTRACTS REPORTER, ¶ 23,120, entitled "Board of Contract Appeals" for a thorough discussion and extended annotation of this point.

The first clear expression of this principle is contained in *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cl. 603, 629-30 (1937). In the ensuing twenty-nine years the rule has been uniformly followed and restated in literally hundreds of decisions by the Court of Claims and the contract appeals boards.[11] These cases hold that the parties' contractual agreement to be bound by the appeals board's factual determinations only related to specific disputes. The cases hold that the parties did not agree to be bound by appeals board determinations of facts involved in breach of contract claims, suits for reformation or rescission.

This intent of the parties should be given effect. The contemporaneous interpretation of the contract by one of the parties (*i.e.*, the contract appeals boards) for almost thirty years should be controlling. The interpretation is reasonable, and to the extent, if any, that the "Disputes" clause is ambiguous it must be construed against the Government as its drafter. Examination of the annotations cited above reveals the cataclysmic change sought by petitioner.

There also are very practical reasons requiring adherance to the existing interpretation. To accept petitioner's position would produce endless wrangling as to whether a particular factual finding by an appeals board was necessary to its decision. Obviously, the

---

[11] Discussion and annotation of the Board's lack of authority to reform or rescind contracts are found in 2 CCH GOVERNMENT CONTRACTS REPORTER, ¶¶ 23,100, 24,085; Discussion and annotation of the Board's lack of authority to correct a mistake in bid, *id.*, ¶¶ 23,105, 24,085; Discussion and annotation of the Board's lack of authority to decide breach of contract claims, *id.*, ¶¶ 23,120, 24,080; Discussion and annotation of the Board's lack of authority to consider other types of claims against the Government, *id.*, ¶ 23,130.

board has some discretion as to how many or how few evidentiary findings it will make in determining an ultimate fact. Where they are "common facts", are evidentiary findings binding on the courts? May not an appeals board make so many evidentiary findings as to effectively remove all factual finding from the courts? What is the status of an evidentiary finding that the appeals board considered necessary in arriving at its ultimate factual finding? May the court disagree that the evidentiary finding was necessary and consider it unnecessary and gratuitous and therefore not binding on it because it was outside of the matter before the appeals board? Resolution of these problems would be far more time consuming than simply trying the issues *de novo* in the court.

What use may the court make of *de novo* evidence properly admitted as relating to one issue but also directly relating to a "common fact" found by a board? If such evidence discloses the board finding on a common fact to be incorrect must the court nevertheless accept the incorrect fact and base its decision upon it?

There is another serious procedural problem. Even under petitioner's interpretation, board findings on common facts would remain reviewable under the Wunderlich Act standards. Such review would be impractical. Frequently, the trier of facts arrives at a factual conclusion, not on the basis of a single item of evidence or certain lines of testimony, but rather "on the whole record." The plaintiff would then be entitled to have the court examine the whole appeals board record to determine whether the board's finding on some relatively unimportant "common fact" is supported by substantial evidence. Such problem always exists when credibility of witnesses is in issue,

which is almost every case where there is a conflict in testimony. It also exists when the allegation is made that a particular finding is highly improbable and unsupported when considered in the context of all the other evidence in the record. In such circumstances, the boards would have to send to the court the entire administrative record and the court would have to read it, including, perhaps, thousands of pages of transcript, merely to determine whether an evidentiary finding or a relatively minor "common fact" meets the Wunderlich Act requirements.

On pages 26 and 27 of its brief, petitioner argues "courts of appeals have also uniformly given administrative findings of fact properly rendered pursuant to the "Disputes" clause the finality accorded by that clause and the Wunderlich Act, *regardless of the conceptual nature of the judicial claim involved.* [Citing four cases.]" [Emphasis supplied.] Not one of the four cases stands for the proposition asserted. None involves common facts.

United States v. *Peter Kiewit Sons Co.*, 345 F. 2d 879 (8th Cir. 1965). This case held that the claim being asserted was not a tort but arose under the contract and should have been presented to the contract appeals board. The court dismissed on the ground that it was without jurisdiction because the plaintiff had failed to exhaust its administrative remedy by presenting the case to the board. The court added as *dictum* that, even if the contractor had a choice of remedies (i.e., tort or contract), his presentment of the claim to the contracting officer constituted an election to proceed on the contract and a waiver of the tort. The entire opinion deals with "the conceptual nature

of the claim involved" and thus supports *Shimato's* position rather than petitioner's.

Allied Paint & Color Works v. *United States,* 309 F. 2d 133 (2d Cir. 1962). Because a legal issue was involved, the contractor here asserted that he was entitled to a trial *de novo* in court even though he had received a contract appeals board determination under the "Disputes" clause. The court denied a trial *de novo* on the ground that the underlying fact issues had been fully heard by the board. This is the same rule applied by the Court of Claims where the issue is a legal one. See discussion, *infra,* of *Morrison-Knudsen Co., Inc.* v. *United States,* 345 F. 2d 833 (Ct. Cl. 1965).

United States v. *Hamden Co-op Creamery Co.,* 297 F. 2d 130, 133-135 (2d Cir. 1961). In this case the contractor wanted to offer "newly discovered evidence." This offer was rejected on the ground that the evidence was "too insignificant" and the case was decided on the basis of the board record. The court had first found that the fact issue had been properly before the board under the "Disputes" clause. (297 F. 2d at 133). This case is not inconsistent with the *Utah* case.

Silverman Bros., Inc. v. *United States,* 324 F. 2d 287, 289-290 (1st Cir. 1963). This case simply holds that the contract appeals board may determine under the "Disputes" clause the Government's excess costs of reprocurement where a contractor has been terminated for default. This has been the rule for so long that no citation of authority is necessary. This long-accepted principle has nothing to do with the issue presently before the Court.

In summary, it is Shimato's position that the courts and the parties have consistently construed the "Disputes" clause as distinguishing between disputes arising under the contract and suits for breach of contract, reformation, rescission and injunction. The "common fact" situation was not a problem until the Court in *Bianchi* held that judicial review of board findings was limited to the board record. Petitioner's suggested solution to this problem is wholly unreasonable and impractical, while Shimato's suggested solution is reasonable and practical. Shimato's solution gives full effect to the intent of the parties to vest the boards with final authority to resolve any dispute within their jurisdiction and for the courts to fully resolve any dispute within their jurisdiction. The "Disputes" clause is directed to the resolution of "disputes" and makes final the board's findings of fact in connection with resolution of that dispute. It was not intended to elevate an isolated finding to finality outside the framework of the particular dispute. The principle of collateral estoppel is applicable only to judicial determinations.[12] While the parties could have agreed to be "collaterally estopped" under the Disputes clause, it is apparent on the basis of the foregoing considerations that it was not their intent to do so.

II. REFUTATION OF PETITIONER'S ARGUMENT ON THE SECOND ISSUE

Petitioner also argues that the boards should determine, under the "Disputes" clause, *all* factual controversies arising from performance of the contract. Petitioner asks the Court to reject the existing distinction between claims arising "under the contract" and those

[12] See generally, 30A Am. Jur., *Judgments*, §§ 328, 329 (1958).

involving breach of contract, reformation, rescission, or injunction. Under petitioner's thesis, after the board makes a determination of the facts, it should grant relief where such relief is available under the contract (*i.e.*, pursuant to the "Changes," "Changed Conditions," etc. clauses), and where the board has no authority to grant relief (*i.e.*, breach of contract, reformation, rescission, injunction), board-found facts should be presented to the appropriate judicial forum and be binding on that forum. Petitioner admits that the consistent practice of the courts and boards has been otherwise and makes various arguments as to why this Court should now change the existing practice.

Petitioner's four arguments in support of its position are discussed separately below. Aside from the legal defects in petitioner's position, its utter impracticality is apparent. Since it is necessary that *someone* determine the factual issues in a suit for breach of contract or reformation, it is inherently unreasonable to have one forum (the board) determine the facts and then to have another forum (the court) decide the legal issues on the basis of the board-found facts. The more reasonable method is to have the forum with the authority to grant the relief requested also determine the facts upon which such relief is predictated. *Morrison-Knudsen Co., Inc.* v. *United States, supra.* Moreover, if the Government's position were adopted, it would produce endless wrangling both on the board level and in the courts as to what is fact, what is law, and who has authority to determine questions of mixed fact and law.

The more reasonable practice is the one presently prescribed in *Morrison-Knudsen Co., Inc.* v. *United*

States, supra, in which the Court of Claims avoided the very troublesome question of determining between fact and law. In that case, the contracting officer directed the performance of certain work believing it to be required by the contract under his interpretation of the specifications. The contractor performed the work under protest, contending it was extra work compensable under the "Changes" clause. The contractor's claim for payment of the extra work was denied by the board and the parties stipulated in the Court of Claims that the board had authority to award the relief requested, *i.e.*, payment for the extra work under the "Changes" article. The issue before the Court of Claims was who should decide the underlying facts where the basic dispute involves a legal question such as interpretation of the contract. The contractor contended that because the issue was legal and only the courts have jurisdiction to finally decide such legal issues (section 2 of the Wunderlich Act, 41 U.S.C. § 322 (1964)), the court should also have jurisdiction to decide the underlying facts.

After noting that it was frequently impossible to accurately distinguish between fact and law, the court came a very reasonable and practical result. It held that, where the contract appeals board has authority under the contract to grant complete relief for the claim, the board should determine all facts relating thereto even though the principal issue is legal. The court stated that upon judicial review of such a decision by a board, the court would not be bound by the legal conclusions of the board but would be bound by its factual findings, subject to review under Wunderlich Act standards. It is submitted that this result is reasonable and practical. Whenever the board has

authority to grant complete relief, it should have the authority to make all factual findings in connection therewith. When the board does not have authority under the "Disputes" clause to grant complete relief, then it should have no authority to make factual determinations. It is submitted that this is the intent of the "Disputes" clause of the contract.

Another aspect of the impracticality of the Government's position is that the boards would have difficulty in knowing what facts a court would consider material in, say, a suit for reformation. To what extent should the board find evidentiary facts as distinguished from ultimate facts? What procedure is utilized where the court determines that the board findings are insufficient to form a basis for a conclusion—should the case be referred back to the board for further findings where there is evidence already in the record on which the additional findings by the Court may be based? Must the court in each instance review the entire administrative record to determine whether the facts found by the board meet the Wunderlich standards? May the court read the board record and be influenced by its contents, or must its decision be based solely upon the facts found by the board? These problems, and probably a great many additional unforeseen problems, would arise by adoption of petitioner's position.

1. Petitioner argues that the language of the "Disputes" clause ("all disputes concerning questions of fact arising under this contract") is sufficiently broad to include those facts relating to breach of contract, reformation, rescission and injunction, as well as facts relating to disputes for which the board can provide a remedy. This may be conceded as a matter of simple

grammatical construction. However, as pointed ou above, the clause has never been construed that wa either by the courts or by the parties, and, to th contrary, a distinction has always been maintaine beween claims "arising under the contract" and claim for breach of contract etc.

Petitioner argues against the application of suc distinction because allegedly there sometimes is diffi culty in determining whether a claim is for a breac or whether it arises under the contract. It cites onl *Postashnick* v. *United States,* 123 Ct. Cl. 197 (1952 in support of this dubious proposition. Petitione argues that in the *Potashnick* case the court awarde damages for breach of contract where the same relie was allegedly available under the "Changed Condi tions" clause of the contract. An examination of th *Potashnick* case indicates that the basis for the court' decision was knowing misrepresentation which th court held was not compensable under the "Change Conditions" clause. Whether this is a correct resolu tion of the issue is immaterial; the citation of a singl case reflects the infrequency with which such alleged difficulty may occur.

The Government argues further, "A party denie administrative relief under a specific clause need onl assert that the Government's conduct underlying his request for relief was unreasonable in order to trans mute a claim 'arising under' the contract into one fo 'breach.' " (Petitioner's Brief, page 32.) Petitione cites no authority for this statement which is baldl erroneous.

2. Petitioner argues that the distinction between the two types of claims frustrates the purpose of the "Dis-

putes" clause. (Petitioner's Brief, page 33.) The argument begs the question since the issue relates to the scope of the "Disputes" clause. Shimato asserts that its scope is limited to those claims "arising under the contract."

Petitioner argues that one of the purposes of the "Disputes" clause is to ensure that the contractor continues to perform pending resolution of the dispute. Shimato agrees that that is one of the purposes of the clause. Petitioner argues further that, if the Court of Claims' distinction between breach of contract claims and those "arising under the contract" is maintained, contractors will be stopping their work whenever they believe there has been a breach of contract by the Government and thus disrupt "important . . . defense or other essential Governmental purposes." (Petitioner's Brief, page 33.) The simple answer to this contention is that the distinction has always been maintained, and petitioner is unable to cite a single instance in which such work stoppage occurred. Moreover, it is elementary contract law that not every breach will entitle the innocent party to refuse to perform, but only such serious breaches as would constitute a repudiation of the contract, 6 *Corbin, Contracts* §§ 1253, 1254 (1962). Presumably such a serious breach could arise and there could be a work stoppage, but petitioner has cited no such instance.

At page 34 of its brief, petitioner argues "From the standpoint of providing an expeditious administrative process for settling factual disputes, we submit that it makes no difference whether a dispute is a 'breach claim' or an 'arising under' claim." Petitioner's reference to "administrative process" once again reflects its confusion between arbitration proceedings and the

Governmental administrative process discussed und
Shimato's Point 2, *supra.* Moreover, petitioner's arg
ment contains a logical fallacy. There is no inhere
value in expeditious settlement of factual disput
per se unless the board *also* has the authority to gra
the relief requested. For example, even under pe
tioner's theory the final resolution of a breach of co
tract claim will not occur until the *court* renders
decision regardless of who makes the factual dete
minations.

3. Petitioner here repeats its argument that t
Court of Claims' distinction between the two types
claims offers contractors dissatisfied with the boa
results an opportunity to relitigate factual disputes
alleging in court that the claim is for breach of co
tract. As discussed above, this is a illusory proble
because by definition the two types of claims a
mutually exclusive. As stated in the *Morrison-Knu
sen* case, the Court of Claims will accept as bindi
upon it all factual determinations made by a boar
where the board has authority under the contract
grant complete relief. It is only with respect to th
residue of claims and disputes that the Court of Claim
will take original jurisdiction and hold a trial fo
determination of facts.

It is submitted that the *Saddler* case relied upon b
petitioner is entirely consistent with the *Morrison
Knudsen* case. In *Saddler,* the Court of Claims hel
that the changes authorized under the "Changes
clause of the contract were limited to those within th
general scope of the contract and any change outsid
the scope of the contract constituted a breach of con
tract. In other words, under a contract for the con
struction of a garage, the Government could not, pur

suant to the "Changes" article, direct the construction of a 50-story building.

At page 38, petitioner again demonstrates its misapprehension of the nature of the Wunderlich Act. Petitioner states: "One of the basic purposes of the Wunderlich Act in providing for finality of factual findings under the Disputes clause . . . ."

As discussed in Shimato's Point 2, *supra,* the basic purpose of the Wunderlich Act was not to provide "finality of factual findings under the Disputes clause." Such factual findings already were final as that clause was interpreted in the *Wunderlich* case, absent fraud. Contrary to the Government's understanding, the purpose of the Wunderlich Act was to *limit* finality except where the findings met the standards set forth therein.

4. Petitioner's fourth argument seems to concede that the breach of contract (reformation and rescission) distinction has always been made but asks that these hundreds of cases be reexamined in light of *Bianchi* and that the rule be changed. Throughout its brief petitioner refers only to breach of contract as the division between court and board jurisdiction. This is not correct, because, as previously noted, the courts also have jurisdiction over claims for reformation, rescission and injunction. Even if the trend is toward reducing pure breach of contract claims by the addition of relief clauses to the contract, it may be stated that no board has ever exercised or suggested that it should exercise jurisdiction over requests for reformation, rescission or injunction.[13]

---

[13] See *supra* note 11.

(a) Court of Claims Cases.

Petitioner argues that the rationale of the pre-*Bianchi* cases is either invalid or suspect. But even if these contentions were correct, and they are not, it still remains that those cases reflect what was in the minds of the contracting parties at the time the "Disputes" clause was first initiated. If, thirty years later, it were demonstrated that their intent was based on some legal misapprehension it would not change the intent. Moreover, once the Court of Claims had first clearly stated that intent (*Phoenix Bridge Co.* v. *United States, supra*) all further use of the "Disputes clause" was in contemplation of the intent as stated in the *Phoenix Bridge* case. Regardless of the correctness of that case, by using the "Disputes" clause in their subsequent contracts, the parties accepted the existing judicial interpretation.

(b) Administrative Practice.

Petitioner admits that the boards have refused to take jurisdiction in "pure" claims for breach of contract. It argues that there are three reasons why the boards have refused to accept such jurisdiction and that each of such reasons is invalid.

Petitioner first asserts that this Court has held that Government-caused delays are not actionable. Even a casual reading of the cases cited discloses that they do not so hold. The rule is that the Government is responsible for its delays in the same manner as any private party. See Clark, *Government-Caused Delays in the Performance of Federal Contracts: The Impact of the Contract Clauses*, 22 *Mil. L. Rev.* 1 (1963); Speck, *Delays-Damages in Government Con-*

tracts; Constructive Conditions and Administrative Remedies, 26 GEO. WASH. L. REV. 505 (1958).

Second and third, petitioner argues, the boards have declined jurisdiction of breach claims only because they are attempting to comply with decisions of the Court of Claims thought to preclude such relief. Petitioner cites no board cases or other authority for this statement. That the administrative officers of the Government independently believed themselves to be *without* such authority is demonstrated by the address of the Deputy General Counsel of the General Accounting Office, reproduced in the Appendix hereto.

Petitioner argues strenuously that the revised charters of some of the boards *now* give them jurisdiction over breach claims. At page 47, petitioner cites a Memorandum from the Secretary of War purporting to give the board such authority. In so arguing, petitioner again misses the basic distinction, discussed in Shimato's Point 2, *supra,* between the two hats worn by the boards, one administrative and not binding on contractors and one contractual which is binding on contractors. Unilateral changes or increases in the boards' jurisdiction cannot affect the contractual agreement between the parties. Moreover, the department or agency heads cannot create such authority *sui generis* and cannot delegate to their boards authority they do not themselves possess. See Appendix hereto.

5. Petitioner here presents as a separate point, its argument, already made two or three times, that Government officers do have authority to pay breach claims. These contentions are refuted in the Appendix hereto. But even if such Government officers do have authority to pay breach claims their authority to do so is admin-

istrative and not contractual. Since it is undisputed by petitioner that the parties have always *believed* that Government officers do not have such authority, their use of the "Disputes" clause was in contemplation of such belief and they therefore did not intend that the head of a department or agency would have under the "Disputes" clause contractual jurisdiction over such claims.

CONCLUSION

The court below held that the intent of the "Disputes" clause is that the courts and boards each have jurisdiction over the facts underlying the type of relief within their respective jurisdictions. The court below has applied a similar rule in *Morrison-Knudsen Co., Inc.* v. *United States, supra,* where it held that the boards should finally determine those facts underlying what is basically a legal issue *if* the board can grant the relief requested, otherwise the court should determine the facts and the law.

Shimato asserts that the foregoing represents a very reasonable and practical solution to the entire problem of the division of jurisdiction between the courts and boards on contract disputes. Moreover, it is consistent with the long-established contractual intent of the parties. On the other hand, petitioner asks the court to cause a revolutionary change without offsetting benefits to its many inherent impracticalities. It is

submitted that the intent of the parties should be controlling and the decision below upheld.

Respectfully submitted,

ASHLEY SELLERS

GILBERT A. CUNEO

DAVID V. ANTHONY
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D. C. 20006
Attorneys for Shimato Construction Company, Ltd.